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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETER JAY GERBER AND MIRIAM
GOLDBERG,

Plaintiffs,

vs.

BAYER CORPORATION AND BAYER
HEALTHCARE PHARMACEUTICALS,
INC.; BMC DIAGNOSTICS, INC.;
CALIFORNIA PACIFIC MEDICAL
CENTER; GENERAL ELECTRIC
COMPANY; GE HEALTHCARE, INC.; GE
HEALTHCARE BIO-SCIENCES CORP.;
McKESSON CORPORATION; MERRY X-
RAY CHEMICAL CORP.; and DOES 1
through 35

Defendants.

Case No: 3:07-cv-05918-JSW

**PLAINTIFFS' REPLY TO REMOVING
DEFENDANTS' OPPOSITION TO MOTION
FOR REMAND**

Date: January 11, 2008
Time: 9:00 a.m.
Courtroom: 2

JURY TRIAL DEMANDED

Removing Defendants have failed to meet their burden of proving that Plaintiffs have no possible cause of action against any of the four non-diverse Defendants. Additionally, Removing

1 Defendants have advanced an illusory argument in support of their request for this court to defer
2 ruling on Plaintiffs' remand motion. Plaintiffs' Motion for Remand should be granted.

3 **A. Removing Defendants Have Not Met Their Burden of Proof.**

4 To determine its jurisdiction, the Court need not decide whether Plaintiffs can prove a legally
5 cognizable claim against the non-diverse defendants, but only that they have pled one under state
6 law. *Schultz v. Astrazeneca Pharmaceuticals, L.P.*, 2006 LEXIS 94534, *7 (Case No. C 06-6681
7 CW, N.D.Cal. 2006) (citing *Briggs v. Lawrence*, 230 Cal. App. 3d 605, 610, 281 Cal. Rptr. 578
8 (1991)). The removal statute is strictly construed against removal jurisdiction. See *Becraft v.*
9 *Ethicon*, 2000 U.S. Dist. LEXIS 17725, *6 (Case No. C 00-1474 CRB, N.D.Cal. 2000) (citing *Gaus*
10 *v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (noting that jurisdiction "must be rejected if there is any
11 doubt as to the right of removal in the first instance")). Removing Defendants always have the
12 burden of proving that removal is proper. (See *id.*) (noting that there is a "strong presumption"
13 against removal jurisdiction).

14 In the present case, Removing Defendants allege that the four California defendants are all
15 fraudulently joined. Accordingly, Removing Defendants bear the burden of proving that Plaintiffs
16 cannot prevail on a single cause of action against any of the four California defendants. *Plute v.*
17 *Roadway Package Sys., Inc.*, 141 F.Supp.2d 1005, 1008 (N.D. Cal. 2001); see also *Schultz*, 2006
18 LEXIS 94534 at *12-13 (holding that defendant failed to show that there was no possibility that
19 plaintiffs would be able to establish liability against non-diverse defendant in state court). Any
20 disputed factual issues, any ambiguities in state law, and any doubts arising from inartful, ambiguous
21 or technically defective pleading must be resolved in favor of remand. *Plute*, 141 F.Supp.2d 1005;
22 see also *Maher v. Novartis Pharmaceuticals Corp.*, 2007 U.S. Dist. LEXIS 58984, *6 (Case No.
23 07852, S.D.Cal. 2007). A finding that any of Plaintiffs' claims is colorable against any one of the
24 four California defendants is sufficient to mandate a remand to San Francisco Superior Court. *Plute*,
25 141 F.Supp.2d 1005; see also *Schultz*, 2006 LEXIS 94534, *7.

B. Plaintiffs' Have Pled a Colorable CLRA Cause of Action Against Each of the California Defendants. Removing Defendants' Arguments Regarding Lack of Notice are Frivolous.

Removing Defendants insist that Plaintiffs' CLRA claims are barred for lack of notice. But, in their CLRA cause of action, Plaintiffs consciously and intentionally sought equitable relief only. (*Complaint* ¶¶ 120-122.) The CLRA's notice provisions apply only to actions for damages. Cal. Civ. Code § 1782(a). An action for injunctive relief pursuant to the Consumer Legal Remedies Act may be commenced without providing notice. Cal. Civ. Code § 1782(d) ("An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a)").

Defendants also make the plainly erroneous argument to the effect that Plaintiffs' CLRA claim fails because they missed a thirty day deadline to amend the complaint to seek damages. But, there is no statutory requirement that Plaintiffs must amend their pleading within thirty days to request damages. The law simply allows an amendment seeking damages "not less than 30 days after the commencement of an action for injunctive relief". Cal. Civ. Code § 1782(d). Whether and when to file such an amendment is discretionary, not mandatory. The relevant language is as follows:

"(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), the consumer may amend his or her complaint without leave of court to include a request for damages. The appropriate provisions of (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages."

Plaintiffs' CLRA cause of action against the non-diverse defendants is colorable.

C. Plaintiffs Have Pled a Colorable Negligence Cause of Action Against Each of the California Imaging Facility Defendants. Removing Defendants' Argument That They are Immune From Liability Is Frivolous.

1 In essence, Removing Defendants argue that no corporate medical facility can ever be held
2 liable for negligence. They offer no support for this novel proposition because there is none. In fact,
3 Defendants' position runs directly counter to settled California law. "[A] hospital is negligent if it
4 does not use reasonable care towards its patients. A hospital must provide procedures, policies,
5 facilities, supplies and qualified personnel reasonably necessary for the treatment of its patients."
6 Judicial Council of Cal., Civil Jury Instns. (2006) CACI No. 514. (citing *Vistica v. Presbyterian*
7 *Hospital & Medical Center, Inc.* (1967) 67 Ca.2d 465, 469, 62 Ca.Rptr. 577, 432 P.2d 193; *Rice v.*
8 *California Lutheran Hospital* (1945) 27 Cal.2d 296, 302, 163 P.2d 860.)

9 Under this standard, Plaintiffs' complaint clearly pleads a colorable negligence claim against
10 the Imaging Facility Defendants. Plaintiffs' complaint alleges, among other things, that the Imaging
11 Facility Defendants negligently marketed and sold their MRI and MRA facilities and services, which
12 included gadolinium based contrast agents used in connection with MRIs and MRAs (*Complaint* ¶
13 86); Plaintiffs' complaint also alleges that "[t]he Imaging Facility Defendants subjected Mr. Gerber to
14 MRIs and MRAs using gadolinium-based contrast agents" (*Complaint* ¶ 81); "[t]he Imaging Facility
15 Defendants knew or should have known that administering MRIs and MRAs using gadolinium-based
16 contrast agents to patients with Impaired renal function, such as Plaintiff, posed a serious risk of
17 bodily harm to such patients" (*Complaint* ¶ 82); and "[t]he Imaging Facility Defendants breached
18 their duty of care to Plaintiff by failing to correctly ascertain, assess and account for Plaintiff's renal
19 function prior to subjecting Plaintiff to MRIs and MRAs and by failing to adequately communicate to
20 Plaintiff the warnings, instructions, risks, dangers and side effects of receiving MRIs and MRAs
21 using gadolinium-based contrast agents." (*Complaint* ¶ 85.)

22 The Imaging Facility Defendants' corporate status does not immunize them from liability for
23 their own acts of negligence. Additionally, they are liable for the negligence of the physicians who
24 use their facilities. "A hospital is liable to a patient under the doctrine of corporate negligence for
25 negligent conduct of independent physicians and surgeons who, as members of the hospital staff,
26 avail themselves of the hospital facilities, but who are neither employees nor agents of the hospital."
27 *Elam v. College Park Hospital*, 132 Cal. App. 3d 332, 335 (1982). Removing Defendants' have
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1 failed to meet their burden to establish that there is no possibility that Plaintiffs may prevail on their
2 negligence cause of action against the Imaging Facility Defendants.

3 **D. The Issue of Whether the Distributor Defendants Can Be Liable Under**
4 **California Law Must Be Resolved in Favor of the Plaintiffs.**

5 The declarations in support of Removing Defendants' Opposition acknowledge that
6 McKesson and Merry X-Ray, both California residents for diversity purposes, distributed Omniscan
7 and Magnevist. (See Lawson Decl. ¶ 2.) (Pulito Decl. ¶ 3.) Defendants represent to this Court that
8 remands of cases involving pharmaceutical distributors are a "glaring exception" confined to rulings
9 of the Central District. This representation does not withstand scrutiny. In addressing whether
10 distributors of prescription drugs are sham defendants, courts in the Northern, Southern, Eastern and
11 Central Districts of California have concluded that they are not shams due to the fact that under
12 California law, a distributor of prescription drugs could possibly be liable for failure to warn. See
13 *Maier*, 2007 U.S. Dist. LEXIS 58984, *6; *Aaron v. Merck & Company, Inc.*, 2005 U.S. Dist. LEXIS
14 40745, *8 (Case No. CV 05-4073-JFW C.D. Cal. 2005) (defendant failed to meet heavy burden of
15 demonstrating that there is no possibility that plaintiffs will be able to prevail); *Black v. Merck &*
16 *Company, Inc.*, 2004 U.S. Dist. Lexis 29860, *6 (Case No. 038730 C.D. Cal. 2004) (remanding a
17 pharmaceutical products liability case in which McKesson Corp. was a defendant; defendant failed to
18 meet heavy burden to show "absolutely no possibility" that plaintiffs could prevail); *Martin v. Merck*
19 *& Company, Inc.*, 2005 U.S. Dist. LEXIS 41232 (Case No. S-05-750 E.D. Cal. 2005) (defendant
20 failed to meet heavy burden to show to a near certainty that cause of action is precluded under
21 California law); see also *Becraft*, 2000 U.S. Dist. LEXIS 17725, *6 (concluding that a distributor can
22 be liable under California law for defective sutures).

23 The Distributor Defendants are indisputably non-diverse. Plaintiffs have pled colorable
24 causes of action against them. Any disputed facts or ambiguities in state law must be resolved in
25 favor of remand. *Plute*, 141 F.Supp.2d 1005, 1008; *Maier*, 2007 U.S. Dist. LEXIS 58984, *6
26 (remanding a pharmaceutical products liability case in which McKesson Corp. was a defendant)
27 (citing *Little v. Purdue Pharma, LP*, 227 F. Supp. 2d 838, 849 (S.D. Ohio 2002) ("a federal court
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1 should hesitate before pronouncing a state claim frivolous, unreasonable, and not even colorable in an
2 area yet untouched by the state courts.")).

3 **E. None of Plaintiffs' Causes of Action are Barred by the Statute of Limitations.**

4 Without any basis, Removing Defendants argue that the statute of limitations began to run on
5 Plaintiffs' claims in 1997, and therefore, all of Plaintiffs' claims are time barred. (See Defendants'
6 *Opposition* 6:10-20.) Defendants' assertions are meritless.

7 First, Plaintiffs' complaint does not allege that Mr. Gerber's injury occurred in 1997 and
8 nothing on the face of the complaint shows that Plaintiffs' claims are barred by any statute of
9 limitations. Defendants essentially concede this point when they argue that "[p]laintiffs should have
10 pled... the date Mr. Gerber contracted NSF..." (*Defendants' Opposition* 8:12-13.) Therefore, there is
11 no basis for a finding that any of Plaintiffs' claims are barred.

12 Second, under no circumstances could it be possible for Plaintiffs' CLRA claims to be time
13 barred due to the fact that in their CLRA cause of action, Plaintiffs seek to enjoin Defendants from
14 engaging in current and on-going conduct. (*Complaint* ¶¶ 120-123.)

15 Finally, even if Plaintiffs had pled that Mr. Gerber's injury had occurred more than two years
16 prior to filing of the complaint, the discovery rule would clearly apply to delay accrual. The case of
17 *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797 (2005), cited by Removing Defendants, is
18 instructive on the issue. In *Fox*, the California Supreme Court found that the Plaintiff had failed to
19 adequately plead facts sufficient to withstand demurrer because she failed to allege specific facts
20 supporting the general allegation that she could not have discovered the cause of her injury within the
21 limitations period. (*Id.* at 811.) But here, Plaintiffs have done precisely that. In support of their
22 allegation that the cause of Mr. Gerber's injuries was not and could not have been discovered until a
23 time less than two years before the filing of the complaint (*Complaint* ¶ 67), Plaintiffs allege:
24 "Defendants have repeatedly and consistently failed to advise consumers and/or their doctors of the
25 causal relationship between gadolinium-based contrast agents and NSF in patients with renal
26 insufficiency." (*Complaint* ¶ 61.) "It was not until September 2007 that Bayer and GE sent letters to
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1 healthcare providers warning them of the risk of NSF to kidney impaired individuals who received
2 MRIs using gadolinium-based contrast agents.” (*Complaint* ¶ 62.)

3 Further, in *Fox*, the court held that because it was apparent that the deficiencies in the
4 complaint could be cured, the plaintiff should be given leave to amend her complaint to make the
5 appropriate allegations. Similarly here, it is clear that plaintiffs could cure any deficiencies with
6 respect to accrual simply by citing GE’s own public statement that the linkage of NSF to gadolinium
7 based contrast agents was not known to the medical community, and there was no report of the link
8 in the world’s published literature, until 2006. (See Ex. C. pp. 3-4, to Decl. of Debra DeCarli in
9 Support of Motion for Remand (GE Position Paper)). Because any pleading deficiencies with respect
10 to the discovery rule could be easily cured by amendment, any doubts arising from inartful,
11 ambiguous or technically defective pleading must be resolved in favor of remand. *Plute*, 141
12 F.Supp.2d 1005; see also *Maher*, 2007 U.S. Dist. LEXIS 58984, *6.

13 Defendants should not be allowed to publicly pronounce that the link between their
14 gadolinium based contrast agents and NSF was unknown to them and the entire medical community
15 until 2006 and to then take the position here that Plaintiffs should have discovered the link at an
16 earlier time.

17 **F. The Court Should Not Defer Ruling on Remand**

18 Removing Defendants urge this court to ignore the fact that there is no basis for federal
19 jurisdiction in this case and to stay proceedings pending transfer to a non-existent MDL. Removing
20 Defendants’ argue that “absent a stay, there is a distinct possibility of inconsistent rulings by different
21 federal district courts on virtually identical remand issues.” (*Defendants’ Opposition* 2:16-17.) This
22 argument does not withstand scrutiny for at least two reasons. First, there is only one other case
23 involving remand issues possibly subject to MDL coordination. (*Id.* at 2:9-12.) Second, none of the
24 remand issues in that other case will be remotely similar, let alone identical, to the remand issues
25 present here. The other case was filed in Louisiana state court. (*Id.*) The only non-diverse
26 defendants are healthcare facilities. (*Id.* at 13.) As should be obvious from the briefs filed by the
27 parties in connection with removal and remand of the present case, the issues here are all based on
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1 California substantive and procedural law, namely: Do California statutes of limitation bar all of
2 plaintiffs' claims? Have plaintiffs adequately pled facts to delay accrual under California's discovery
3 rule? Does the CLRA (California's Consumer Legal Remedies Act) notice provision apply to bar
4 plaintiffs CLRA claims? Does California law allow a failure to warn claim against a distributor of
5 prescription drugs? Are plaintiffs' claims against the Facility Defendants made not viable by
6 operation of California law? Because none of the issues arising in connection with a remand motion
7 in a case filed in a Louisiana state court will be similar to the issues present here, there is no risk of
8 inconsistent rulings. Consequently, the basis for Defendants' request for a stay is illusory. This court
9 should decide the remand issue.

10 CONCLUSION

11 Removing Defendants have failed to establish that Plaintiffs have *no possible claim* against
12 *any of the four* California defendants. Therefore, they have failed to meet their burden of proving
13 that each of them is fraudulently joined. Accordingly, this matter must be remanded because
14 complete diversity of citizenship is lacking.

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16 Dated: December 28, 2007

LEVIN SIMES KAISER & GORNICK LLP

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18 By: s/ Lawrence J. Gornick
19 Lawrence J. Gornick, Esq.
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1 I certify that I am over the age of 18 years and not a party to the within action; that my business
2 address is 44 Montgomery Street, 36th Floor, San Francisco, CA 94104; and that on this date I served a
3 true copy of the document(s) entitled:

4 **PLAINTIFFS' REPLY TO REMOVING DEFENDANTS' OPPOSITION TO MOTION FOR**
5 **REMAND**

6 Service was effectuated by forwarding the above-noted document in the following manner:

7 **By Regular Mail** in a sealed envelope, addressed as noted above, with postage fully prepaid
8 and placing it for collection and mailing following the ordinary business practices of Levin
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10 **By Hand Delivery** in a sealed envelope, addressed as noted above, through services provided
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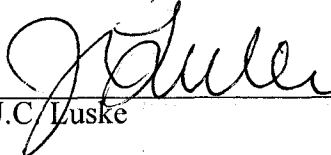
12 **By Facsimile** to the numbers as noted below by placing it for facsimile transmittal following
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14 **By Overnight Courier** in a sealed envelope, addressed as noted above, through services
15 provided by (Federal Express, UPS,) and billed to Levin Simes Kaiser & Gornick.

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17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on December 28, 2007 at San Francisco, California.

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20 J.C. Luske
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